Nos. 04-10566 and 05-51

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF PROFESSORS OF INTERNATIONAL LAW, FEDERAL JURISDICTION AND THE FOREIGN RELATIONS LAW OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* *

Amici are professors and scholars of law with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. This case raises important questions concerning the interpretation of treaties to which the United States is a party and the authority of an international tribunal to effect direct changes in a core area of U.S. domestic law, namely whether individuals can assert treaty violations in the course of a criminal prosecution and secure suppression of evidence and dismissal of such proceedings. Acceptance of the arguments put forward by petitioners would undermine the authority of the Executive Branch in interpreting the international obligations of the United States, disregard the authority of Congress to determine the conditions under which federal courts can enforce international law, and bring about an unprecedented and profound change in the relationship between international organizations and domestic lawmaking in the United States.

SUMMARY OF ARGUMENT

The Vienna Convention on Consular Relations does not require the United States to permit individuals to challenge treaty violations in domestic court, and there is no evidence that the President or the Senate intended such an outcome when they adhered to this treaty. The President's interpretation of the Vienna Convention warrants substantial deference from this Court. The President is in the best position to determine the impact of any particular inter-

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* In accordance with Supreme Court Rule 37.6, *Amici* affirm that no person or entity other than *Amici* and their counsel authored this brief in whole or in part, and that no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

pretation on the foreign relations of the United States. In this case the President's interpretation is consistent with the text of the Convention, which does not specify the means of domestic enforcement, and the practice of other signatory states, not one of which has treated the Vienna Convention as authorizing private enforcement in domestic courts. A contrary interpretation would cast a pall on future treaty negotiations by the United States because it would increase the risk of unanticipated and potentially undesirable private interference with treaty enforcement.

Neither comity nor a policy of uniform treaty interpretation compels this Court to regard the Vienna Convention as creating a private right of enforcement. The International Court of Justice, the only tribunal that has reached such a conclusion, is not a national court but an international agency with clearly delimited authority. It lacks the characteristics of a domestic agency that invite judicial deference. Regarding it as an expert body deserving of special deference will deter the United States from joining future treaties that assign even limited responsibility to international agencies. Finally, a decision that the Vienna Convention authorizes private enforcement will disrupt rather than promote uniform treaty interpretation, as no other state has reached such a conclusion.

ARGUMENT

I. THE VIENNA CONVENTION DOES NOT CONFER ON INDIVIDUALS A JUDICIALLY ENFORCEABLE RIGHT TO CONSULAR NOTIFICATION AND ACCESS

This Court has long held that the decision of the United States to adhere to a treaty, made in conformity with Article II, § 2, cl. 2, does not automatically endow individuals with the right to seek judicial redress for treaty violations. Because treaties typically establish obligations between states, they do

not normally empower domestic courts to embark on their own enforcement regime. Courts are reluctant to infer that this power exists absent clear evidence that the Executive and the Senate intended such a result. In the case of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (Vienna Convention), there is no evidence indicating that the Executive and the Senate expected courts in the United States to adjudicate private claims based on that treaty.

A. The Question of Whether a Treaty Creates a Judicially Enforceable Right Is Analytically Distinct From the Issue of Whether a Treaty is Self-Executing

This Court long has recognized that the questions of whether a treaty is self-executing and whether it allows individuals to seek judicial redress for its violation are analytically distinct questions. To say that a treaty is self-executing means only that no further legislative enactment is necessary for the treaty to have legal effect in the United States. In the case of the Vienna Convention, for example, the treaty is self-executing in the sense that police officials became obligated to inform persons under detention of the possibility of consular notification without further actions by Congress. To say that a treaty has *some* legal effect, however, does not mean that every person with an interest in the treaty's enforcement necessarily has the power to seek judicial relief for a violation. Rather, the courts of the United States must determine who has the authority to enforce a treaty and what remedies may be sought in light of what the treaty text expressly requires and what the Executive and the Senate intended in adhering to the instrument, interpreted against the general background practice of the political branches and the judiciary with regard to treaty enforcement.

At a minimum, a treaty should not be read as empowering private persons to obtain domestic judicial enforcement in circumstances where a domestic statutory enactment would not be interpreted as authorizing a private suit. As this Court has held on numerous occasions, a statute can have legal effect and still not delegate enforcement power to individuals. *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. ___ (2005); *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *cf. Cannon v. University of Chicago*, 441 U.S. 671, 730 (1979) (Powell, J., dissenting).

Some of these cases involve the doctrine of implied private rights of actions, while others deal with the scope of specific legislation, particularly 42 U.S.C. § 1983. What they have in common, and what makes them relevant to the issue of treaty interpretation, is their recognition that legislative choices about enforcement mechanisms represent significant policy determinations that should not be preempted by the judiciary. The manifest capacity of Congress to provide expressly for private enforcement of its enactments often has persuaded this Court that it should not attempt to create an additional enforcement mechanism when Congress has not asked it to do so. The same logic applies to treaty interpretation.

Petitioners, in effect, seek a rule that would create a strong presumption in favor of implying judicial enforcement of treaties on behalf of private persons. The Brief for *Amici*

Curiae Law Professors in Support of Petitioners, at 5, argues in particular that:

> "[I]f an individual was harmed by a past violation of his primary treaty rights, or if he is likely to be harmed by a future violation of those rights, then the individual is entitled to a judicial remedy, even if the treaty itself does not create a private right of action, and even if the treaty says nothing about the capacity of individuals to invoke the treaty before a domestic court."

This proposal should be compared with the four-factor test of *Cort v. Ash*, 422 U.S. 66 (1975), which for some years was invoked by this Court as the basis for implying a private right of action from a statute. The proposal would go much further than did the now discredited *Cort* test, because it would mandate private enforcement even if only one of the *Cort* criteria were met, namely if the plaintiff is a member of a class for whose especial benefit a measure was adopted.

Yet the reasons for not implying a private right of enforcement from the unadorned language of a treaty provision are, if anything, stronger than those for not reading private enforcement rights into a statute. First, treaty rights by their nature involve the obligations of not just the United States, but of the other parties to the compact. Yet private judicial enforcement of treaty rights in other countries, absent clear and explicit provision, is unheard of. Thus, private enforcement in the United States would create a substantial asymmetry in the burdens borne by the United States. Second, treaty obligations, unlike statutes, cannot be amended unilaterally by the President and Congress. Rather, clarification of a treaty in light of a judicial determination that does not reflect the intent of the parties requires a new treaty negotiation and unanimous assent of all treaty parties. These institutional impediments to treaty adoption and implementation suggest that this Court should not lightly read private enforcement into treaties.

On numerous occasions Congress has provided expressly for private enforcement of treaty rights. The most common instance involves dispute settlement processes that have the capacity to produce monetary awards. The United States both has signed treaties with individual states to resolve particular disputes and joined multilateral regimes that create a means for addressing prospective controversies. In these instances, Congress has enacted separate legislation providing for the domestic recognition of the decisions of these tribunals. Where no separate authorizing legislation applied, this Court refused to give effect to a tribunal award. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899) (claim derived from Convention Between Mexico and the United States of 1868 subject to judicial consideration only pursuant to 1892 statute); *United States* v. *Blaine*, 139 U.S. 306, 323 (1891) (same Convention: "The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it."); *United States v. Weld*, 127 U.S. 51 (1888) (1871 Treaty of Washington); *Alling v. United States*, 114 U.S. 562 (1885) (1868 Mexico-United States Convention); *Great Western Insurance Co. v. United States*, 112 U.S. 193 (1884) (1871 Treaty of Washington); *Frelinghuysen* v. *Key*, 110 U. S. 63, 74 (1884) (1868 Mexico-United States Convention: "No nation treats with a citizen of another nation except through his government.").

Two modern multilateral regimes to which the United States is a party similarly reflect this pattern. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, provides for the recognition and enforcement of commercial arbitration awards. The United States both joined the treaty and enacted 9 U.S.C. §§ 201-07, which gives domestic force to the treaty rights by expressly authorizing judicial enforcement. Similarly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270,

T.I.A.S. No. 6090, 575 U.N.T.S. 159, obligates the United States to give effect to arbitration awards in investment disputes. Congress then enacted a statutory provision enabling courts to enforce these awards. 22 U.S.C. §§ 1650, 1650a (2001). Significantly, Congress provided for the special case of enforcement of an international arbitral award against the United States with yet another statute, 28 U.S.C. § 2414 (2001), that gives the Attorney General the discretion to approve payment except in cases where, under authority provided by 22 U.S.C. § 1650a(b), a federal district court has ordered enforcement.

Whatever the practice of this Court in the period before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), when federal courts freely drew on a wide range of sources to craft rules of decision in federal cases, its modern practice has been not to infer an intention to authorize private enforcement of a treaty in the absence of either a separate statute or otherwise clear treaty language and manifest intent of the President and the Senate to do so. See, *e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (treaties not intended to create judicially enforceable private rights). It is this practice that provided the contemporary background to the decision of the President and the Senate to adhere to the Vienna Convention in 1969.

Express authorization of judicial enforcement of treaties is the norm; the instances since *Erie* where this Court has found that a treaty independently provides for private enforcement are rare. For example, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in note following* 49 U.S.C. § 40105 (2001), commonly known as the Warsaw Convention, addresses directly the rights of carriers, shippers and passengers engaged in international air transport, using mandatory language that is typical of private law statutes. Not surprisingly, the signatories to this Convention have treated it as supple-

menting the rules of law that courts can apply to private disputes. *E.g.*, *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (deriving rule of decision from Warsaw Convention in private litigation); *Eastern Airlines v. Floyd*, 499 U.S. 530 (1999) (same). But nowhere has any signatory country's domestic court, much less this Court, inferred from the Warsaw Convention a power of a private person to seek judicial redress against a state that does not fully implement its obligations under the Convention.[1]

B. The Executive Branch's Interpretation of the Vienna Convention is Entitled to Great Deference

The Executive branch consistently has interpreted the Vienna Convention as not conferring judicially enforceable rights on criminal defendants. The State Department articulated this interpretation to the Senate in 1969, when the Convention was being considered for ratification, and in a letter to all 50 state governors immediately following ratification. See S. Exec. Rpt. No. 9, at 18 (1969) (quoting the State Department's representation that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing

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[1] *Amici* cite *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), as an instance where this Court implied a private right to judicial enforcement from executive agreements regarding the claims of Holocaust victims. Brief for Amici Curiae Law Professors in Support of Petitioners at 19-20. But, as this Court noted, the executive agreements at issue in *Garamendi* were not treaties, but rather an expression of the "foreign policy of the Executive Branch" with which a California statute interfered. 539 U.S. at 413. The significance of the policy of the Executive as a basis for preempting state law that interferes with its conduct of foreign relations rests on constitutional grounds that are independent of treaty interpretation. See, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Zschernig v. Miller*, 389 U.S. 429 (1968); *United States v. Pink*, 315 U.S. 203 (1942).

consular conventions."); *United States v. Li*, 206 F.3d 56, 64 (1st Cir. 2000) (quoting the State Department legal advisor's 1970 letter denying that "the Vienna Convention will require significant departures from the existing practice within the several states of the United States"). More recently, the State Department has emphasized that "such a statement would not have been made if the Department of State had contemplated that the [Vienna Convention] might require that failures of consular notification be remedied in the criminal process through prejudice hearings, and possibly the suppression of evidence or the undoing of other aspects of the criminal process." Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* (Oct. 15, 1999) (available at http://www.state.gov/documents/organization/7111.doc).

The Executive's representations to the Senate, the States, and the courts are mirrored in its actual practice implementing the Vienna Convention. As the Solicitor General explained just last year:

> The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the State Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts.

Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 22-23.

The State Department has taken an identical position on behalf of the United States when appearing before international tribunals. The first was Paraguay's suit in the International Court of Justice (ICJ) over Vienna Convention violations in the case of Angel Breard. Paraguay alleged that the Convention entailed an enforceable right to over-

turn Breard's conviction. The State Department, however, insisted that:

> "There is absolutely no support for this claim in the language of the [Vienna] Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties."

Verbatim Record (Paraguay v. U.S.), 1998 I.C.J. 426, at 3.20. Likewise, before the Inter-American Court of Human Rights, the Department argued that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." Written Observations of the United States of America, Request for Advisory Opinion OC-16, June 1, 1998 (corrected June 10, 1998).

Most recently, in its brief to this Court in *Medellin v. Dretke*, the United States reiterated that "[t]he Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence." Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 22-23; see also Brief for the United States as *Amicus Curiae* in Nos. 97-1390 and 97-8214, *Republic of Paraguay v. Gilmore & Breard v. Greene*, at 18-23 (taking the same position). The Executive's interpretation is thus emphatic, consistent, and longstanding. It has been advanced in legislative, judicial, and international fora, as well as in the State Department's day-to-day practice. And it is consistent with the Department's interpretation of other treaties that employ similar language to the Vienna Convention. See Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 25-26 (discussing the International Convention for the Suppression of the Financing of Terrorism).

"Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). Judges Selya and Boudin have explained that this deference arises not only "because the State Department negotiates and administers such treaties," but also "because, when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President." *Li*, 206 F.3d at 67 (Selya & Boudin, JJ, concurring). Should this Court reject a position taken so emphatically and consistently by the United States in international fora, it would risk undermining the credibility of the Government in future litigation and negotiations. That risk should counsel deference to the Executive's consistent interpretation.

C. The Practice of Other States Confirms That No Judicially Enforceable Right Inheres in the Vienna Convention

There are only a handful of reported foreign judicial decisions about enforcement of the Vienna Convention. What precedent exists, however, indicates that criminally accused in other countries do not have the right to obtain independent judicial enforcement of the Vienna Convention.

The leading case is *Regina v. Partak*, 160 C.C.C. (3d) 553 (Ontario Sup. Ct. Jus. 2001), which involved a U.S. citizen whom Canadian police did not inform of his right to consular access when arresting him for murder. The Canadian court ruled that, although the police conduct had violated the accused's rights under Article 36 of the Convention, this violation did not give rise to any independent basis for judicial relief. Instead, the court applied the same standards applicable to a Canadian subject to determine whether the

accused had received proper notice of his right to counsel and had made a voluntary confession.

Similarly, a German court also assumed that Article 36 operated for the benefit of individuals but did not regard that provision as having any impact on the judicially enforceable rights of a criminal accused. *Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 7, 2001*, 5 BGHSt 116/0, *published in* NStZ 2002, 168 (F.R.G.). Moreover, German practice generally reflects the prevailing view of the means of enforcement of the Vienna Convention, namely that a state rectifies its violation of Article 36 by providing to its treaty partner an apology and assurance on future precautions. *See LaGrand (Germany v. United States)*, 2001 I.C.J. 104, at ¶ 63 (describing German practice).

Neither counsel for petitioners nor the many *amici* who have filed briefs in their support have discovered a single case where a foreign court has understood the Vienna Convention as obligating it to entertain private claims based on its violation.[2] Our research also has failed to uncover any such case. While the practice of other nations in the application of a multilateral treaty are not binding on this Court, they do provide substantial evidence of what the makers of that treaty intended. Here the practice of signatory states is fully consistent with the position that the Vienna Convention does not

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[2] The Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioners, at 20, cites the Canadian and German decisions discussed above as authority for the proposition that Canadian and German courts "have accepted as binding the ICJ's interpretation that the VCCR creates judicially enforceable rights." This is wrong. First, the Canadian decision contains no reference to any ICJ decision at all, and the German decision made no reference to the ICJ's views on judicial enforcement. Second, in each instance the court ruled that the Vienna Convention did not authorize national courts to provide any special remedies where the police failed to honor the notification obligation.

of its own force authorize national courts to entertain private efforts to enforce its obligations.

D. The Court Should Avoid an Interpretation of the Vienna Convention That Will Discourage the United States from Entering into New Treaty Commitments

The recognition by this Court of a private right to seek judicial enforcement of the Vienna Convention would do more than impose on the United States a burden that no other national court has placed on any state that adheres to that treaty. It would establish a precedent for implication of private enforcement of international treaties more broadly. Such a precedent would cast a pall on all future U.S. treaty negotiations, at least where the interests of individuals were potentially at issue.

Since the conclusion of World War II, the Executive and Congress have manifested a persistent concern that the assumption of international obligations by the United States would lead to new assertions of claims for judicial relief by private persons, with attendant uncertainty and potentially undesirable outcomes. During the 1950s the Senate came within a single vote of recommending a constitutional amendment that would have precluded any treaty from having any domestic legal effect. President Eisenhower at that time initiated a practice of reassuring the Congress that the Executive would not seek to use international agreements as a general means for changing domestic law. *See* Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475 (2001). Later administrations have adhered to this path.

On some occasions, the President and the Senate have taken extra measures to ensure that the judiciary does not interpret a treaty as creating new rights for which individuals can seek judicial enforcement. The practice of announcing

"reservations, understandings and declarations" (RUDs) at the time of signing or approving a treaty has become common since the Carter Administration. Typically a RUD contains a statement to the effect that the United States does not regard the treaty as operating independently of the existing mechanisms for protecting individual interests under U.S. law. For a comprehensive review of the practice, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

It would be wrong, however, to assume that the President and the Senate intend a treaty to create judicially enforceable private rights in all instances where a RUD is not made. First, the practice is precautionary and does not permit any negative inference. Second, some authorities have questioned whether it is even possible for a RUD to be effective. Not only have scholars argued that the Constitution forbids the President and the Senate from imposing any limitation on the domestic effect of an international treaty, *e.g.*, Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995), but at least some judges have embraced the argument. *E.g.*, *Igartua-De La Rosa v. United States*, 415 F.3rd 145, 189-90 (1st Cir. 2005) (Howard, J., dissenting).

Sound regard for the President's responsibility to conduct the international affairs of the United States requires a strong presumption that, in the absence of very clear treaty language and confirmatory evidence of party intent from the Executive and the Senate, treaty obligations do not create private entitlements to judicial relief. Any other rule is likely to reduce both the number and quality of international commitments that will be undertaken by the United States.

Nothing other than the national interest and a desire to ameliorate international problems compels the Executive to enter into treaty negotiations. The Senate historically has exercised its advise and consent power with great circum-

spection and often has refused to approve treaties that present a risk of unforeseeable domestic legal developments. The predictable outcome of a presumption in favor of private enforcement thus would be fewer and lesser treaties, undermining U.S. objectives in international cooperation.

These risks are illustrated by recent litigation over the Vienna Convention. Until 2005, the United States was a party to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (Optional Protocol), a treaty that gave the ICJ the authority to hear disputes between parties to the Convention. Concerned that some U.S. courts might treat the decisions of the ICJ as a binding rule of decision that private persons could invoke in their lawsuits, the President decided to withdraw from the Optional Protocol.[3]

The building of international law through treaties and other international agreements is both critical and valuable. The President and the Senate must engage a fast changing, and not always benign, world with a full array of legal resources. This exercise of the foreign affairs power and the treaty power itself will be thwarted by appending an unpredictable set of civil lawsuits and criminal defenses to silent treaty texts. Criminal law enforcement in our constitutional system is handled by hundreds of thousands of federal, state, county, and local police officers. The potential disruption to thousands of criminal prosecutions, including grave crimes that involve victim's rights, is not to be lightly entertained.

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[3] Nor was this an idle fear. Months after the denunciation of the treaty, one Court of Appeals asserted that "we are of the opinion that the United States is bound by ICJ rulings in cases where it consented to the court's jurisdiction, just as it would be bound by any arbitral procedure to which it consented . . ." *Jogi v. Voges*, 425 F.3rd 367, 384 (7th Cir. 2005).

In recognition of these exigencies, this Court should clarify the law applicable to the domestic enforcement of treaties to make clear to the political branches what the international obligations that they contemplate will mean in terms of domestic consequences. In particular, this Court should support the constitutional role of these branches as the masters of our nation's international commitments.

II. NEITHER COMITY NOR THE NEED FOR UNIFORMITY IN TREATY INTERPRETATION JUSTIFIES A CONCLUSION THAT THE VIENNA CONVENTION FORBIDS A STATE FROM APPLYING A NEUTRAL PROCEDURAL RULE TO FORECLOSE UNTIMELY ASSERTIONS OF A CLAIM OTHERWISE ASSERTABLE UNDER THAT TREATY

Petitioners argue that this Court should follow the ICJ's interpretation of the Vienna Convention. Without warrant in the language of the Convention, the ICJ has asserted that Article 36 operates for the benefits of individuals, that the Convention entitles persons who have not received the requisite notification of a right to consular access to a judicial hearing as to whether the treaty violation has prejudiced them, and that this entitlement cannot be made contingent on timely assertion of the violation. All three of these interpretations are wrong. Moreover, no reason exists for this Court to privilege the interpretation of the ICJ over the interpretation consistently offered by the Executive.

A. The Doctrine of Comity Traditionally Has Been Applied to the Decisions of Foreign States, Not Those of an International Organization Created by Treaty

Petitioners argue that this Court must follow the ICJ's interpretation of the Vienna Convention as a matter of com-

ity. But this argument is inapplicable under the circumstances of this case.

First, the ICJ's interpretation cannot be reconciled with the language of the treaty or general international practice. Until the ICJ's decisions in the several Vienna Convention cases, no responsible decisionmaker had suggested that treaty commitments otherwise silent on the issue would override neutral and longstanding domestic rules regarding the timeliness of asserting claims and procedural default.

Second, the doctrine of comity, which has its origins in the Treaty of Westphalia and the concepts of sovereign power arising from the settlement of the Thirty Years War, applies to sovereigns, not to international bodies that themselves are the product of international agreements. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), clearly states that comity constitutes "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another *nation*." (emphasis added). This limitation on the doctrine of comity is not a mere formality: International law rests on the choices and behavior of states. An international organization such as the ICJ is a creature of the international instrument that creates it, and has only such authority as that instrument specifies, and hence the signatory states authorize. Extending the authority of an international body through common law doctrines such as comity undermines, rather than reinforces, the choices that signatory states made in the body's foundational instrument.

International law traditionally has involved rules created by states that constrain the otherwise unfettered exercise of national sovereignty. But an international organization such as the ICJ has no independent sovereignty, and thus nothing to surrender through international bargaining. Rather, an international body's authority is the product of bargaining among the states that create it. Comity, which grows out of both respect for another nation's sovereignty and an expec-

tation of reciprocity, thus has no bearing on an international entity such as the ICJ, which lacks both sovereignty and the capacity to act reciprocally.

Nor is the ICJ, in its role as an adjudicative body interpreting the Vienna Convention in the course of resolving inter-state disputes properly before it, analogous to a domestic agency charged with interpretation of a statute. We do not question the need for judicial deference to a domestic agency's exercise of the discretion left to it by Congress to elucidate the meaning of the statute that it administers. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). But an international court does not stand in the same position as does a domestic agency in its effect on the domestic law of the United States. There is no sound basis for inferring from any supposed ambiguity in treaty language a delegation to an international agency of the authority to provide an authoritative, binding interpretation of its meaning.

First and most important, the formulation of a statutory interpretation by a domestic agency is subject to numerous procedural and institutional constraints during its promulgation and can always be changed by a simple legislative enactment. An international organization, in contrast, does not have to comply with any requirements of public access and participation, nor indeed with the ethical rules appropriate to a constitutional democracy. More importantly, the United States cannot unilaterally correct or amend ICJ interpretations with which it disagrees. It only has the unpalatable alternative of withdrawing from a treaty, as it did with regard to the Optional Protocol. Congress, by contrast, can repudiate or revise any agency interpretation of domestic law with which it disagrees while leaving the underlying statutory scheme intact and certainly without incurring the international repercussions of a treaty abrogation.

Second, the mandate and composition of an international tribunal reflects the many and various national interests of the states that set it up. Although we must assume that establishment of a tribunal by a treaty to which the United States is a party reflects the best interests of the United States, it does not follow that the members of the tribunal have any ongoing obligation or incentive to act in ways that are compatible with U.S. goals and values. Rather, members are chosen by particular states and, even though they are not the official representatives of their national governments, often continue to reflect the perspective of those governments.[4]

Nothing in this Court's past decisions indicates a willingness to give special deference to the ICJ's interpretation of international law. On occasion this Court has regarded ICJ decisions as evidence of the content of international law in cases that depend on international law for their resolution. See, *e.g.*, *United States v. Maine*, 475 U.S. 89 (1986) (looking to 1951 ICJ decision as evidence of rule of decision to be applied in dispute over seabed ownership); *United States v. Louisiana*, 470 U.S. 93 (1985) (same). But it also has demonstrated a willingness to disregard or narrow claims based on ICJ judgments. See, *e.g.*, *Breard v. Green*, 523 U.S. 371, 375 (1998) (ICJ decision did not trump procedural rules of forum state).

The same approach should apply here. The opinion of the ICJ is one piece of evidence as to the content of the obligations that signatories to the Vienna Convention bear. This evidence cannot outweigh, however, the language of the Convention, the considered views of the Executive, the consistent practice of the signatory states, or clear indications

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[4] For recent scholarship presenting evidence that the judges on the ICJ vote in ways that broadly reflect the interests of the states that appoint them, see Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?* 34 J. LEG. STUD. 599 (2005).

of the understanding of the President and the Senate at the time that the United States approved the treaty.[5] All of these factors make clear that when the United States approved the Vienna Convention, it did not thereby endow persons accused of crimes in the United States with a new avenue to obtain judicial review of police actions.

B. Extending the Doctrine of Comity to an Organization Created by Treaty Would Discourage the United States from Agreeing to Establish Such Organizations

The creation of permanent international organizations based on treaties and other international agreements is one of the most important developments of the post-World War II period. The United Nations, the World Bank and the International Monetary Fund were established at the end of the War; many other bodies have followed since. Important recent examples include the World Trade Organization, established by an international agreement that Congress endorsed in 1994, and the International Criminal Court, founded by a treaty that the United States signed in 2001 but, following strong indications of opposition in the Senate, President Bush later indicated that the United States would

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[5] To the extent the legislative history of the Optional Protocol is relevant, one should note that a representative of the State Department explained in testimony before the Senate, regarding the legal effect of the Optional Protocol, "[i]f problems should arise regarding the interpretation or application of the convention, such problems would probably be resolved through diplomatic channels." Vienna Convention on Consular Relations, Sen. Exec. Rpt. 91-9, at 19 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). Additionally, "*parties* to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id* (emphasis added). Nothing in this testimony suggests that the United States anticipated that accession to the Optional Protocol would require U.S. courts to open up literally thousands of future criminal convictions to judicial challenge due to the ICJ's interpretation of the Vienna Convention.

not approve. Many of these organizations typically exercise an adjudicative function and purport to provide authoritative interpretations of the treaties or agreements on which they are based.

We do not question the value and importance of these kinds of international organizations, whatever the shortcomings of particular bodies. They permit states to develop organized, predictable and multilateral responses to global problems that overflow national boundaries. Their assertions about the meaning of particular treaties can guide the conduct of international actors and help to form a consensus. But if a consequence of setting up such an organization were a substantial possibility that U.S. courts would regard its pronouncements as authoritative or preclusive, then our political branches understandably would be wary of entering into new commitments, or of continuing adherence to prior agreements, that establish such adjudicative bodies.

In a few recent instances where the United States by legislative enactment consented to the delegation of certain adjudicatory functions to international organizations, Congress expressly provided that private persons could not invoke any aspect of the international agreement (including implicitly the interpretations of the presumably authoritative interpreters) in domestic court. *E.g.*, North American Free Trade Agreement Implementation Act of 1993, § 102(c) (codified at 19 U.S.C. § 3312(c)); Uruguay Round Agreements Act of 1994, § 102(c) (codified at 19 U.S.C. § 3512(c)); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act of 2005, § 102(c) (codified at 19 U.S.C. § 4012(c)). These particular instances indicate a more general unwillingness on the part of

Congress to invite domestic courts to exercise free reign in implementing the decisions of international tribunals.[6]

A decision by this Court to extend the doctrine of comity to the ICJ not only would run counter to these clear indications of the intent of the political branches, but would chill future efforts to create and empower international tribunals. The President and Congress, in the case of executive agreements, or the Senate, in the case of treaties, would not be able to ensure that establishment of such a body would not have unwanted ramifications in domestic law. As noted above, they have been unable to rely on the compliance of lower courts even in the face of express directions not to treat a treaty as creating judicially enforceable rights. Without a clear indication from this Court about the limited effect of international adjudication on domestic law, the political branches are likely to hold off from any future commitments in spite of their clear value.

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[6] In each of these three instances, Congress has provided for a narrowly tailored legal mechanism for domestic enforcement of the trade agreement. The United States is authorized to bring suit for prospective relief against state and local law or practice that violates U.S. obligations under the agreement. No other kind of litigation is permitted. North American Free Trade Agreement Implementation Act of 1993, § 102(b)(2) (codified at 19 U.S.C. § 3312(b)(2)); Uruguay Round Agreements Act of 1994, § 102(b)(2) (codified at 19 U.S.C. § 3512(b)(2)); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act of 2005, § 102(b)(2) (codified at 19 U.S.C. § 4012(b)(2)).

C. Other Countries Do Not Ordinarily Interpret Their Treaty Commitments as Delegating to International Organizations the Authority to Render Judgments in Particular Disputes To Be Enforced by Their Domestic Courts in the Absence of an Express Provision Stipulating Such an Effect

Petitioners argue that this Court should defer to the ICJ's interpretation of the Vienna Convention so as to promote uniform interpretation of that treaty. To the contrary, were this Court to regard the jurisprudence of the ICJ as obligating the judiciary of the United States to enforce the Vienna Convention at the behest of private persons, it would depart from, rather than reinforce, widely accepted international understandings about the relationship between international obligations and domestic law.

Other countries do not normally interpret a treaty acceding to the jurisdiction of an international tribunal as imposing on domestic courts the responsibility for enforcing the orders of such tribunals. The only significant exception to this principle is the case of the judicial bodies of the European Community. But the European Community constitutes a *sui generis* attempt to create an extensive legal regime embracing its member states, not a template for general international law. And even the European Court of Justice, the principal judicial body of the European Community, has rejected the possibility that it could act as an enforcing agent for any other international tribunal.

Considering first the International Court of Justice, our research has turned up no instance where a nation has embraced the principle of direct enforcement of ICJ orders. The universal practice is to regard ICJ decisions as important evidence of the content of international law in cases where such law is relevant to a matter otherwise before a national court, but not as independent grounds for a national court's

authority. Nations understand that their legislatures and governments, not their judiciaries, have the primary responsibility for effecting compliance with ICJ orders. We are unaware of any instance, and petitioner and the various *amici* in support of petitioner cite to no instance, where another state through a domestic court decision has mandated the direct enforcement of an ICJ order. For a comprehensive review of foreign judicial decisions rejecting direct enforcement of ICJ decisions, see A. Mark Weisburd, *International Courts and American Courts*,21 MICH. J. INT'L L. 877, 886-87 (2000).[7]

European practice regarding the European Court of Human Rights also is instructive. This international tribunal oversees compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, a treaty with 45 parties that protects basic human rights in the covered countries. Since 1998, individuals have had the right to bring a case directly to the European Court of Human Rights. But enforcement of its judgments, including orders for compensation, depends entirely on local law, not the Convention itself. In the United Kingdom, for example, it is the Human Rights Act 1998, ch.

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[7] *Amici* intimate that Belgium has given direct effect to an ICJ decision involving the immunity from arrest of government officials. Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 26 n.46. But the Belgium courts grounded their decisions on their interpretation of domestic law. See Constanze Schulte, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 270 (2004); Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-06 (2003); Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003) (Belgian Supreme Court decision rested on Belgian statute). *Amici* wishes to substitute speculation by scholars about the motivation of these decisions for what the courts actually said.

42 (Eng.), that provides the legal basis for domestic enforcement of the Convention. For a recent discussion of the relationship between the Convention and British law, see *A v. Secretary of State*, [2005] 2 A.C. 68, ¶ 42 (H.L. 2004). Even European nations whose constitutions subordinate domestic legislation to international law, such as Germany, Italy, and the Netherlands, do not give direct effect to the judgments of the European Court of Human Rights. For a thorough discussion of practice in these countries, see THE EXECUTION OF STRASBOURG AND GERMAN HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (Tom Barkhuysen et al. eds. 1999).

The European Union (EU) and the European Community (EC), the EU's principal institutional structure, rest on treaties which, in the case of the European Community, create judicial bodies. The parties to these treaties do regard the decisions of the judiciary of the European Community, namely the European Court of Justice (ECJ) and the ECJ's Court of First Instance, as generally creating judicially enforceable interests in their domestic legal order. See, *e.g.*, *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1991] 1 All E.R. 70 (H.L.). But cf. *Brunner v. The European Union Treaty*, [1994] 1 C.M.L.R. 57 (German Federal Constitutional Court) (reserving right to review decisions of ECJ for compliance with German constitutional order). This outcome, however, results not from an abstract sense of obligation to comply with the orders of international tribunals, but rather because of explicit provisions in the treaty constituting the EC. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33, Articles 228, 244, 256. These articles expressly impose on domestic courts the obligation to carry out the orders of the ECJ.

The direct enforcement of ECJ decisions by the member states does not represent a new approach generally to

domestic incorporation of international law. The EC involves a distinctive, perhaps unique, level of extensive and intensive cooperation among the members, who in a sense have formed a new confederation of member states. Direct enforcement of the ECJ's decisions facilitates that cooperation, much like the decisions of this Court promote the smooth workings of our federal union. Rather than serving as a new model of international adjudication, the ECJ operates in relation to the legal system of the member states much as this Court does with respect to the legal systems of the several States.

The ECJ's approach to international law (the foundational treaties of the EU and the EC aside) closely resembles the traditional perspective of this Court. Like this Court, the ECJ recognizes that the decisions of international tribunals are informative, but that treaty provisions obligating the EC to submit disputes to a tribunal do not mean that the decisions of those tribunals become part of EC law. In particular, the ECJ considers the decisions of the ICJ as evidence of the content of international law in cases where it must look to international law for a rule of decision but retains independent competence to determine whether the international rule at issue has become part of the body of EC law. See, *e.g.*, *A. Racke GmbH & Co. v. Hauptzollamt Mainz (Case C-162/96)*, 1998 E.C.R.I-3655; *Anklagemyndigheden v. Poulsen (Case C-286/90)*, 1992 E.C.R. I-6019. Cf. Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1 (2003) (explaining relationship between ECJ and ICJ).

As we discussed above, no signatory to the Vienna Convention has regarded that treaty as an exception to the general pattern of no private judicial enforcement of treaty obligations. This Court should uphold the Executive's consistent understanding of U.S. obligations under that treaty and refuse to imply a private right to judicial enforcement.

CONCLUSION

The Vienna Convention does not give private persons the power to challenge in court alleged violations of its provisions. A decision to the contrary would have a serious negative impact on the willingness of the political branches to enter into new treaties and create new international organizations with adjudicative functions. The course urged on this Court by petitioners, far from bringing U.S. practice into conformity with that of other nations, would give international law and the decisions of international tribunals a role in the U.S. legal system that other nations do not allow their courts to undertake. Accordingly, the judgments of the Supreme Court of Oregon and the Supreme Court of Virginia should be affirmed.

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